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BARTON ACT 2600

15<sup>th</sup> June 2009

Dear Sir/Madam,

**Submission on the desirability of national human rights legislation**

The attached submission is made for consideration by the Consultation Committee chaired by Father Frank Brennan AO, with Ms Mary Kostakidis, Mr Mick Palmer AO APM and Ms Tammy Williams.

The submission is made by Professor Mary Crock, Professor of Public Law in the Faculty of Law at the University of Sydney. It was prepared with the assistance of Mr Tobias Freeman, a student in the Faculty. It is made in addition to the submission made on behalf of the Sydney Centre for International Law by Dr Ben Saul, which is fully endorsed by Professor Crock. The submission calls on the Committee to recommend in favour of legislating a federal Human Rights Act. After making some general comments on Australia's constitutional history and the adequacy of human rights protections under the Common Law, the submission takes by way of case study the situation of migrant children in this country.

Professor Crock would also invite the Committee to include in its considerations the finding of her study published in 2006 on unaccompanied and separated children seeking protection as refugees in Australia. *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection: A Study of Laws, Policy and Practices in Australia* (Sydney: Themis Press, 2006) is available on line at [http://www.law.usyd.edu.au/scigl/2007\\_docs\\_pdfs/SAA\\_Australia\\_Crock.pdf](http://www.law.usyd.edu.au/scigl/2007_docs_pdfs/SAA_Australia_Crock.pdf).

The authors have had the opportunity of reading the two submissions made on behalf of the Gilbert & Tobin Centre of Public Law - by Mr Edward Santow and by Associate Professor Jane McAdam (together with Mr Tristan Garcia). Professor Crock endorses wholeheartedly both of these excellent pieces of work.

*The barbecue stopper*

There is one aspect of the current debate that is not addressed in this submission: concerns that have been expressed about the constitutionality of any legislative model that confers on the High Court the power to make declarations of compatibility on legislation that is alleged to be in breach of human rights legislation. Although the Committee has received submissions on this matter from a selection of jurists, the Committee is enjoined to put this particular dispute in context. First, there is a long tradition in the High Court of that Court issuing declarations of right providing a dispute has been brought to the Court by a party with standing to complain. Second, while the expertise of the committee is impressive, my personal view is that it should steer away from purporting to make statements about complex constitutional issues that will ultimately fall to be determined by government and by the High Court itself. To start from a premise that in Australia human rights legislation simply “can’t be done” because of the unique features of our Constitution is patently ridiculous.

Thank you for considering this submission. Please let us know if we can be of further assistance to the Committee.

With best wishes

A handwritten signature in blue ink, appearing to read "Mary Crock".

Professor Mary Crock and Tobias Freeman  
Professor of Public Law  
Sydney Centre for International Law

# SUBMISSION TO NATIONAL HUMAN RIGHTS CONSULTATION

**PROFESSOR MARY CROCK**  
**With Mr Tobias Freeman**

## **1 Introduction**

The Committee has received many thousands of submissions – both written and oral – in the course of its consultations across Australia. This submission is made to assist the Committee to put the material it has gathered in something of an historical perspective. It begins with an examination of the debates that occurred when Australia was created as a nation. The argument is made that the discourse in and before 1901 bears marked similarities to the debate that now rages across the country. At issue in 1901 was whether the Australian constitution should enshrine an Australian citizenship. Today the question is whether Australian law should attempt to legislate for the protection of human rights - what some might characterise as the *substance* of citizenship in the most universalist sense of that word. It is possible (we argue) to identify a certain continuity in the way people in Australia have thought about both the worth of articulating rights and the merit of ascribing rights to minority groups. What should be decisive today, however, is that the legal, moral and cultural framework within which Australia is now operating has changed irrevocably. As so many of the learned submissions to the Committee attest, Australia has submitted voluntarily over the years to all of the major human rights instruments created under international law.

The second part of this submission uses migrant children as a case study. The central purpose is to demonstrate that the failure to enshrine obligations Australia has assumed internationally into its domestic laws places us in breach of international law. Three areas are chosen to illustrate the deficits in Australian laws and practice. The first relates to children and immigration detention, demonstrating that in spite of some cultural changes within the immigration administration, the law, policies and the constraints of field operations continue to result in children being held in detention centres. The second relates to children and the right to family life. Here we examine in turn the issue of the deportation of permanent residents convicted of crimes or otherwise being found to be of bad character. Over the years the politics of immigration and crime control have combined to create a toxic mix for children born to such parents. The children in this instance are just as likely to be Australian citizens as they are to have the migrant status of their parents. Over the years the interests of these children have reduced in importance notwithstanding the rights enshrined in the UN Convention on the Rights of the Child. The second sub-issue considered in this context is the operation of the health rules in immigration and the failure to make any distinction between disease and disability. In a number of high profile cases the biggest losers in this system are the disabled children born to families who would bring many benefits to Australia. The law and policies in place now for many years operate as a blanket ban on the admission of such families. The third and final matter considered in the case study is the processing of children within the administration of the *Migration Act 1958*. In essence, this legislation was drafted and continues to operate with the adult migrant as the model.

Legislating human rights obligations would go a long way towards addressing – or at least forcing consideration of the shortcomings in immigration law, policy and practice. Most importantly, it would encourage cultural change within the immigration bureaucracy.

## 2 What Rights Need Protection?

The authors endorse and adopt the recommendations made by the Gilbert & Tobin Centre for Public Law in respect of both the range of rights that should be included in federal human rights legislation and the scope of application such legislation should have. The International Bill of Rights is the obvious starting point for the identification of the rights that should be legislated. In order to have any effect and meaning, it is essential also that any rights that are legislated should be truly universal in their application.

In the case of migrant children, and indeed children generally, the core provisions of the UN Convention on the Rights of the child should be acknowledged and included. This would mean consideration of the following preambular statements from that instrument. In terms of the rights of children within any federal human rights legislation, key provisions from the Convention would include:

### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

- Article 6 (the right to life);
- Articles 7 and 8 (the right to birth registration; nationality; and the preservation of family and national identity);
- Articles 9 and 10 (The right to family unity and reunification);
- Article 12 (The child's right to participate in all decisions affecting the child);
- Articles 11, 19 – 22 (special protection measures for children, including refugee children);
- Article 23 (the rights of disabled children); and

### **Article 37 States Parties shall ensure that:**

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

### **3 Constitutional choices: Why Australia has no Bill of Rights<sup>1</sup>**

The fact that Australia is now the only Western country without a Bill of Rights may make Australia an anomaly, but it is no accident of history. Although the drafters of Australia's Constitution borrowed heavily from American and Canadian constitutional models, critically they decided against enshrining an Australian citizenship in the country's foundation document. If no definition were to be provided as to who was to be considered a member of the Australian community, it followed that the Constitution would be silent also on the rights and duties that might attach to such membership. In other words, the absence of a Bill of Rights in Australia's Constitution can be linked directly to the decision not to create a constitutional status of Australian citizen.

Instead of a citizenship provision, the Constitution conferred on the new federal Parliament the power to legislate for the peace order and good government of Australia with respect to immigration and emigration on the one hand and naturalisation and aliens on the other.<sup>2</sup> As John Quick complained, citizenship in the Australian Constitution was created as "a mere legal inference".<sup>3</sup> The power to make (and unmake) citizens was vested in the new Australian Parliament. The power to determine the rights, entitlements and duties of Australians was also vested in Parliament.

Although legislation was passed soon after Federation that dealt with the *naturalisation* of new arrivals in the country, no attempt was made to enact proper citizenship laws until 1948 – after

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<sup>1</sup> This section of the submission includes material from Mary Crock, "Defining Strangers: Human Rights, Immigrants and the Foundations of a Just Society" (2008) 31 *Melbourne University Law Review* 1053-1071.

<sup>2</sup> See Constitution, s 51(27) and (19) respectively. See also s51(29) which confers power to legislation with respect to "external affairs". The sole reference to the term "citizen" in the Australian Constitution is in s 44 which makes citizens or subjects of a foreign power ineligible for election to the Commonwealth Parliament.

<sup>3</sup> "Again, I ask are we to have a Commonwealth citizenship? If we are, why is it not to be implanted in the *Constitution*? Why is it to be merely a legal inference?" See *Record of the Debates of the Constitution*, Vol V, 1767, cited in Kim Rubenstein *Australian Citizenship Law in Context* (Law Book Co, 2002), 24. John Quick was Convention delegate from Victoria and later author of the authoritative annotation of the Constitution).

Australia had fought in two World Wars! Instead, membership of the new Australian polity was defined in terms of double negatives by specific reference to who was not an “immigrant”. Put another way, the first Australian citizens were like the hole in the doughnut: they were the residue when all of the excluded or excludable people were defined. Australian citizenship as a legal term of art only emerged with the passage of the *Nationality and Citizenship Act 1948* (Cth) which commenced operation on Australia Day 1949.

The decision to confer on the Australian parliament the power to regulate citizenship in both the formal and substantive senses of that term was of fundamental cultural importance. The Australian Constitution was framed in accordance with a Westminster model with three sources of power – Executive, Legislative and Judicial - each placed in balance with the other. However, by entrenching so few fundamental principles, rights and duties in the actual Constitution, the founding fathers created a system that really gives preeminent power to the politicians, working through the Executive and the Legislature. Although Chapter III entrenches the existence of the High Court of Australia and of its power to judicially review decisions made by Officers of the Commonwealth, the actual content of the laws to be enforced by the Courts *for the most part* is the province of the Australian parliament. This is reinforced by the long list of legislative powers set out in s 51 of the Constitution. Although difficult to prove, there is some evidence that this construct has made Australia’s federal parliamentarians more resistant to the idea of judicial oversight than, for example, their counterparts in Britain, Canada and the US.<sup>4</sup> Recognising this is important as it underscores why there is likely to be political resistance to the idea of enshrining human rights in the Australian Constitution. Although some politicians (past and present) have shown similar resistance to a Human Rights Act, this model is less politically confronting because it has the potential to leave more residual power with the parliament.

There are fascinating parallels between the early debates surrounding entrenching citizenship and those that now rage over the enactment of human rights legislation. The Convention debates that preceded Federation reveal that the decision not to include an Australian citizenship in the Constitution was based on a variety of quite complex factors.<sup>5</sup> The strongest motivation for not including an Australian citizenship was undoubtedly racist. The words of two of the country’s founding fathers are illustrative in this regard:

Edmund Barton:<sup>6</sup> *“I do not think that the doctrine of the equality of man was really ever intended to include racial equality. There is no racial equality. There is that basic inequality. These races are, in comparison with white races...unequal and inferior”*; and

Alfred Deakin:<sup>7</sup> *“The unity of Australia is nothing, if that does not imply a united race. A united race not only means that its members can intermix, intermarry and associate without degradation on either side, but implies one inspired by the same ideas...”*

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<sup>4</sup> See, for example, Aronson, Dyer and Groves *Judicial Review of Administrative Action* (Sydney: Law Book Co, 4<sup>th</sup> Ed, 2009) , Ch 2 and 3; and David Dyzenhaus, “*Baker: The Unity of Public Law*”, in Dyzenhaus (ed) *The Unity of Public Law* (Toronto: Hart Publishing, 2004), ch 1.

<sup>5</sup> See Rubenstein, above n 3, 30-33.

<sup>6</sup> Commonwealth Parliamentary Debates, 26 September 1901 at 5233.

<sup>7</sup> Commonwealth Parliamentary Debates, 12 September 1901 at 4807.

Creating a constitutional citizenship would have implied an acknowledgement that all persons present in Australia at Federation were potential citizens. For example, Josiah Simon (delegate for South Australia) saw no *need* to define the term ‘citizenship’, using the logic of ‘we know who we are’ – and we know who we want to include and exclude.<sup>8</sup> The difficulty facing the framers of the Constitution was the presence in Australia of a range of individuals who were literally and figuratively outsiders to the youthful Anglo-Saxon communities of settlers. These were Australia’s indigenous inhabitants, the Asians and other people of colour who had made their way into the various colonies since the arrival of the first fleet from England. Rubenstein argues that the desire to carve out an Australian polity with certain racial characteristics is probably the chief reason why the Australian Constitution did finally go to the vote without a clause creating an Australian citizenship.<sup>9</sup>

The echoes of this discourse in the current debates over human rights legislation are apparent insofar as there is clearly a substantial proportion of the Australian electorate who remain resistant to the notion that human rights are truly universal, indivisible, interdependent and interrelated.<sup>10</sup> One might even go so far as to say that the silent majority in Australia *approve* of many of the practices that have drawn complaint over the years on grounds that they are abusive of human rights. It is difficult to find anyone today who still supports the notion that mandatory immigration detention should apply to all illegal migrants irrespective of age, infirmity or level of threat to Australia. However, support for the hard line taken by the Howard government against asylum seekers remains strong.<sup>11</sup> The thought that human rights legislation might prevent or limit the government in its various fights (to control the border; against terror; and against crime generally) is a strong factor operating for the “no” case (even if much of this occurs at a subliminal level).

Other parallels with the early debates require a more nuanced understanding of both early and contemporary discourses on rights. This is where opponents both of a constitutional citizenship

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<sup>8</sup> See the account of South Australian delegate to the Constitutional Convention in Melbourne in 1898, Josiah Symon, in Rubenstein, above n 3, 29.

<sup>9</sup> In their study of how Australia’s early laws impacted on the citizenship of the country’s indigenous inhabitants, Chesterman and Galligan point out that the absence of citizenship provisions in the Constitution cannot be ‘blamed’ for all the discriminatory practices that became entrenched after Federation. The real disenfranchisement of the ‘unwanted’ inhabitants of Australia occurred through a web of state and federal enactments. What these authors might have noted, however, is that these enactments were facilitated by the silences in the Constitution in both the legal form and practical meaning of the concept of citizen. The most striking irony for the immigration scholar is the correlation between the measures taken by the newly federated colonialists – nearly all ‘migrants’ themselves - to exclude from the ‘Australian’ polity, indigenous people and non-white migrants. See J Chesterman and B Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Melbourne, Cambridge Uni Press, 1997), Ch 3.

<sup>10</sup> See Vienna Declaration and Program of Action World Conference on Human Rights, Vienna, 14–25 June 1993, UN Doc A/CONF.157/23, [5] available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

<sup>11</sup> The present government’s awareness of this political reality is apparent in the reluctance it has shown in abandoning all of the Howard government policies. The most notable examples are the laws excising parts of Australia from the “migration zone”; continuing the practice of interdicting asylum seekers arriving by boat; and continuing to refer asylum seekers for a degraded form of refugee status processing on Christmas Island.

and a modern Bill of Rights (either constitutional or statutory) have been motivated by a higher belief in the frameworks provided by association with the structures and history of Great Britain and of the Common Law.

At Federation, Australia did not acquire the status of independent nation and a subject of the Queen born or resident in Australia was legally indistinguishable from a British subject.<sup>12</sup> Interestingly, some thought that the superimposition of an Australian citizenship over and above the colonial status of British subject would be degrading to that most prized of statuses.<sup>13</sup> The early Australians saw themselves first and foremost as subjects of the British Queen. If it was not necessary to define citizenship, neither was it necessary to define what rights and entitlements attached to membership of the community. This was work that was done by the Common Law – again handed down to Australia from the Mother Country.

The nay sayers in the current human rights debate include many who continue to believe that the traditions of the Common Law offer all the protections that are proper and necessary within Australian society. The sentiments of the federationists find resonance also in the arguments made by legal historians like my colleague Professor Helen Irving who is a firm believer in the shared understandings of that come with the heritage of history. She seems to find her opposition to human rights legislation in the notion that the entitlements of community members should be seen properly as the fruits of *political* negotiation (through time) rather than absolute standards imposed by an unelected judiciary. There is at least some irony in this line of argument insofar as the Australian courts have played a central role through history in defining and enforcing both community membership and entitlements.

#### **4 Why Australia needs a federal Human Rights Act**

The primary argument in favour of Australia abandoning its exceptionalist position so as to legislate a federal Human Rights Act is that the current system *is* broke and *does* need fixing. On a number of occasions in recent years Australian law, policy and practice has been found wanting in its ability to protect the human rights of individuals in this country. The traditions of the Common Law have not proved adequate to prevent the mandatory detention of migrant men, women and children – even in cases where legislation has opened the possibility of indefinite

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<sup>12</sup> *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 183 per Mason CJ, Wilson, Brennan, Deane, Dawson & Toohey JJ.

<sup>13</sup> In their annotated constitution, Quick and Garran (at 955) lament that despite the ‘apparently logical’ contentions in the 1889 Convention that there should be a national citizenship ‘above beyond and immeasurably superior to State citizenship’ these contentions were not accepted, and consequently legal membership of the Commonwealth must be deduced from the Constitution rather than flowing from explicit provision. Nonetheless they acknowledge (at 957) that ‘there might have been an impropriety’ in preferring citizen over subject. The nearest concept in the Constitution equivalent to citizenship of the Commonwealth is ‘people of the Commonwealth’ but that is a subsidiary status to subjects of the Queen common to the individual units of the Empire. Quick and Garran regarded the new status as at least an embryonic Australian nationality. They suggest that people of the Commonwealth who ‘territorially’ may be termed Australians, although ‘constitutionally’ remaining British subjects or subjects of the Queen, nonetheless acquired the ‘character’ of a member of the people of the Commonwealth. This, they state, is a national character not lost either when travelling between the States of the Federation, between parts of the Empire or outside it: see 957-58

detention. The silences in the Constitution have created on-going uncertainties about who Australians think they are and, indeed, what citizenship should mean in substantive terms. Sadly, the decision to vest power in the Parliament to determine matters relating to membership of the Australian community has made the whole concept of human rights in Australia susceptible to the vagaries of politics. It is almost axiomatic that the persons most at risk in such a situation are minority groups and persons who by dint of their position or actions are deeply unpopular. The passage of human rights legislation – as a voluntary act of the federal parliament – would go at least some way towards reducing the vulnerabilities of such persons in the face of the vocal majority who have the ear of government.

Cutting across many of the arguments made by opponents of human rights legislation is the simple fact that Australia has now undertaken to ensure compliance with the human rights instruments that make up the international Bill of Rights. It has done this through the signature and ratification of the key international human rights instruments – from the International Covenant on Civil and Political Rights (ICCPR) through to the most recent addition: the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Indeed, as many have argued, the failure to enact comprehensive human rights legislation has for a number of years placed Australia at risk of non-compliance with its obligations under Art 26 of the Vienna Convention on the Law of Treaties.<sup>14</sup>

## **5 Migrant children as a case study**

The situation of migrant children provides a salutary and multifaceted example of both the shortcomings in the current human rights regime and the benefits that a Human Rights Act would bring. Although matters have improved substantially in recent years, there remain a number of areas where the need for better human rights protection is manifest. Three areas are chosen for comment here. They are: children and immigration detention; the right to family life; and the processing of immigration applications involving children.

### ***Migrant children and the international rights framework***

One of the great ironies given the deplorable treatment of children in many countries around the world is that there has been almost complete unanimity within the international community that children are especially deserving of respect and protection. The UN Convention on the Rights of the Child (1989) (UNCRC) has been signed and ratified by all but two members of the United Nations. Australia has signed and ratified this instrument but has failed to enact in any generic way the central protections it contains.

The UNCRC has four distinct foci: “The participation of children in decisions affecting their own destiny; the protection of children against discrimination and all forms of neglect or exploitation; the prevention of harm to children; and the provision of assistance for their basic needs.”<sup>15</sup> The ‘best interests’ principle is expressed in Article 3(1):

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<sup>14</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 115 UNTS 331, arts 26 and 27.

<sup>15</sup> G Van Bueren, *The International Law on the Rights of the Child* (1995) at 15.

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

These ‘passive’ rights of protection and provision are balanced against the more ‘active’ right to participate in decision-making that affects children and young people. Article 12(1) stipulates that a child who is capable of forming his or her own views has the right to express those views freely ‘in all matters affecting’ them, ‘being given due weight in accordance with the age and maturity of the child’.<sup>16</sup>

Article 22 (1) of the UNCRC requires special protection for children who are refugees or who are seeking refugee status. Most significant it mandates the equal treatment of children who are refugees and children who present as asylum seekers (whose status has yet to be determined):

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

This provision recognises that Australia’s obligations to children who arrive without authorisation are contained in other international human rights and humanitarian instruments, including the UN Convention relating to the Status of Refugees (as amended by the 1967 Protocol); the International Covenant on Economic, Social and Cultural Rights (ICESCR); ICCPR (in particular, Arts 9, 10 and 12), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all of which have been ratified by the Australia Government. As a signatory of UNCRC, Australia not only has a positive obligation to undertake “all appropriate legislative, administrative, and other measures” to implement those rights recognised under UNCRC that deal with child asylum seekers, but also all rights provided for in UNCRC. Australia’s sovereign right to control migration must not be exercised in a manner that conflicts with its international obligations, particularly where vulnerable persons such as, asylum seeker children, are concerned. The protection and entitlements provided for children in Article 22(1) of UNCRC are non-derogable. Australia must provide protection for asylum seeker children and, in doing so, it must also consider its other international human rights and humanitarian obligations. It must ensure that all rights in the UNCRC are guaranteed for asylum seeker children within its territorial jurisdiction.

### ***Migrant Children, immigration detention and the “best interests” principle***

In May 2004, the Human Rights and Equal Opportunity Commission published a major report following its inquiry into Australia’s mandatory immigration detention laws and the treatment of children in immigration detention centres in relation to Australia’s obligations under

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<sup>16</sup> See also, Article 13(1): A child shall have a right to freedom of expression.

international law. Viewed with the later *Seeking Asylum Alone* research,<sup>17</sup> these reports are a damning indictment of the Federal Government's failure over a number of years to adequately protect unauthorised arrival children in accordance with its obligations under UNCRC.

The fundamental principle of the UNCRC is that Australia should act in the child's best interests. This has two important aspects, firstly, that detention should only be used as a last resort and, secondly, that child refugees should enjoy the right to seek asylum.

The *Migration Act 1958* (Cth) allows the Australian Government to regulate, in the national interest, the entry into and presence in Australia of 'non-citizens'.<sup>18</sup> It should be noted from the outset that whilst the Canadian *Immigration and Refugee Protection Act 2001* (IRP Act) expressly states that it is to be interpreted and applied in compliance with international human rights conventions to which Canada is a party<sup>19</sup>, the Australian *Migration Act* makes no reference to international agreements even though Australia has ratified both the Refugee Convention and the UNCRC.

Section 189 of the *Migration Act* sets out the powers and obligations imposed on the Federal Government to detain non-citizens, and until late 2003 it was the general practice of the Australian government to keep all children without valid visas, whether accompanied or not, in custody.<sup>20</sup> There is no distinction in the legislation between the treatment of children with their families and those without. In June 2005, this Act was amended to acknowledge the principle that children should only be detained as a matter of last resort.<sup>21</sup> The Minister for Immigration may make a 'residence determination' for families with children under 18 and unaccompanied children so that they might reside in the community, but they nevertheless retain the status of administrative detainees, and subject to conditions such as being present at the residence at particular times and reporting to immigration officers on a periodic basis. They remain without visas. Prior to June 2005 these children were detained in detention centres, prisons, watch houses and so on. They were removed to or detained on an offshore processing facility at Nauru, Papua New Guinea or Christmas Island.

The effect of these legislative provisions is that, until June 2005, refugee children were deprived of their liberty, no matter whether they were separated children or with their families. Even under the system for 'residence determinations', in place since June 2005, children have been subject to numerous restrictions. In May 2009, the lack of accommodation available on Christmas Island meant that children were once again being accommodated in a high security detention centre. Apart from the fact of detention (and the appalling conditions encountered in

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<sup>17</sup> See Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection: A Study of Laws, Policy and Practices in Australia* (Sydney: Themis Press, 2006) is available on line at

[http://www.law.usyd.edu.au/scigl/2007\\_docs\\_pdfs/SAA\\_Australia\\_Crock.pdf](http://www.law.usyd.edu.au/scigl/2007_docs_pdfs/SAA_Australia_Crock.pdf).

<sup>18</sup> *Migration Act 1958* (Cth), s 4(1). 'Non-citizens' are defined in s 5 as people who are not Australian citizens.

<sup>19</sup> *Id.*, s 3(3)(f).

<sup>20</sup> *Migration Act* s 196, Crock *Seeking Asylum Alone*, at 84.

<sup>21</sup> See *Migration Act 1958*, s 4.

this environment), concerns were raised about the length of time for which children were incarcerated given the administrative challenges faced by a Department being forced to make decisions in very remote locations where facilities were rudimentary to say the least.

The need for human rights protections in this area is underscored by the absolute failure of the judicial system to enforce anything close to the rights that are enshrined in the UNCRC. Two cases decided by the High Court in 2004 illustrate the problem.

In *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) the High Court was faced with an appeal from the Full Family Court which had taken upon itself to order the release from detention of the five Bakhtiyari children. The High Court ruled that the Family Court did not have *parens patriae* jurisdiction to make orders for the release of the five children. It held that the operation of the welfare power under the *Family Law Act* is confined to parental responsibilities and the Family Court could not order the Minister to give orders inconsistent with his obligations under the *Migration Act*.

In *Re Woolley; Ex parte Applicants M276/2003*,<sup>22</sup> it was argued that the incapacity of four Afghani children to request voluntary departure, rendered their detention punitive and in breach of Chapter III of the Constitution. In dismissing the application, the High Court pointed out that not all children under 18 lacked the capacity to request removal, and that in the absence of such capacity, parents could make decisions for children. The Court confirmed 6:0 that the essence of mandatory detention was that no distinction was to be made between non-citizens in the basis of factors such as age or vulnerability: the sole question for determination was their immigration status. The decision suggests that children are not only precluded from making their own claims for protection once their parents have had an application refused, but their ongoing detention during the appeal of any refusal of that application is also a matter for their parents.

### ***Children and the Right to Family Life***

Children affected by immigration law in Australia are not just migrant children: there can also be profound impacts on citizen children. Two examples in particular are worthy of comment in this context. The first relates to the operation of the criminal deportation and so called character and conduct provisions in the *Migration Act* 1958. The second concerns the operation of the health rules, specifically as they operate to exclude families of children born with a disability.

#### **Deportation and removal on grounds of criminality or bad character and conduct**

The federal government's resolve to remove from Australia non-citizens who have been convicted of serious crimes or who pose a threat of some kind has long been a political battle ground in which the human rights of children have been prime casualties. Of primary importance in this context are Articles 17 of the ICCPR which prohibits arbitrary interference with the family and Art 23 which enshrines the sanctity of the family within society. These provisions are echoed in the UNCRC and in the ICESCR.<sup>23</sup>

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<sup>22</sup> *Re Woolley; Ex parte Applicants M276/2003* (2004) 210 ALR 369.

<sup>23</sup> See generally the submissions of the Gilbert and Tobin Centre for Public Law.

Battles raged for years over the nature and extent of parliament's power to remove non-citizens who had been resident in Australia for many years. These cases are the most obvious residual manifestation of the confusion engendered by the decision made in 1901 not to include an Australian citizenship in the Constitution. In essence, by the time *Shaw v MIMA*<sup>24</sup> was decided in 2003, the High Court had confirmed that the power to deport permanent residents convicted of crimes was plenary. That is, the removal power is not confined by any constitutional constraint arising from the length of time an individual might have spent in Australia. This is an area where politics has had the most poisonous of impacts on the family lives of Australian children as well as on young people who came to Australia as tiny babies. Every attempt to use legal arguments to forestall the removal of non-citizens convicted of crime has failed.<sup>25</sup> As Michelle Foster writes in a forthcoming article, Stefan Nystrom was a 31 year old man who had lived in Australia since he was 27 days old. He was removed on the basis that his criminal record rendered him incapable of satisfying the 'character' test in s 501 of the Migration Act.<sup>26</sup>

The most celebrated of the cases in which the obligations of UNCRC were considered in the context of a parent convicted of serious crimes is that of *MIEA v Teoh*. There, a majority of the High Court ruled that 'Australia's ratification of the Convention [on the Rights of the Child]... [could] give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity the terms of the Convention.'<sup>27</sup> The high point reached in this 1995 decision has not been translated into substantive gains for children (whether citizens or permanent residents) whose parents are convicted of serious crimes.<sup>28</sup> In the absence of any overarching implementation of Australia's human rights obligations and specifically those contained in UNCRC, the place of children's rights is disturbingly uncertain. The contrast between Australia's jurisprudence and that of many European countries could not be more stark.

### ***Children, disability and the rights to family life***

The other area in which the human rights of children are manifestly excluded from consideration in Australian immigration law is in the operation of the health rules. No distinction is drawn in the relevant provisions between persons affected by disease and those affected by disability. Although some discretion is allowed the Minister to make exceptions in family reunion and humanitarian cases, for most intents and purposes the identification of a family member who would be eligible for a disability pension in Australia results in the exclusion of the whole family. The toughness in the approach taken under the coalition government emerged forcefully in 2001 with the self immolation outside of Parliament House in Canberra and eventual death of

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<sup>24</sup> (2003) 218 CLR 28.

<sup>25</sup> See

<sup>26</sup> See Michelle Foster, "An Alien by the Barest of Threads: The Legality of the Deportation of Long-Term Residents from Australia". Draft on file with Professor Crock.

<sup>27</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 per Mason CJ and Deane J at 291-2. at 288

<sup>28</sup> Note that *Teoh* dealt with issues of procedural fairness and did not guarantee any child a right to have their best interests taken into account as a 'primary consideration' in decision-making. Moreover, the precedential value of the case was questioned in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 (12 February 2003).

one Shahraz Kiane. Mr Kiane was an asylum seeker who was granted a protection visa as a refugee in 1997. He tried for four and a half years to sponsor his family to join him in Australia under the “split family” provisions of a 202 Global Special Humanitarian visa. He was denied on the basis that his youngest daughter had cerebral palsy and so would be eligible for a disability pension, thus representing an undue cost for the Australian community. The man’s relatives in Australia offered to tender to the government the amount of the costs assessed by the Commonwealth Medical Officer: all to no avail. Notwithstanding a scathing report by the Ombudsman following the man’s death,<sup>29</sup> the government maintained its position and the family were not visaed to come to Australia from Pakistan.

This is an area of law that now places Australia in direct conflict with obligations it has assumed in signing and ratifying the UN Convention on the Rights of Persons with Disabilities. It is another example of the need for a generic and enforceable system for the recognition and protection of human rights in Australia.

### ***The processing of migrant children***

The last area where human rights legislation would operate to the benefit of migrant children is in the general treatment of children’s cases under migration law. Here the problem is often not one of malevolence on the part of government. It is rather that children are simply not “seen” in a system that is designed primarily for adults. Human rights legislation could operate to force the consideration of children in everything from the collection of relevant statistics through to the design of visa programs to the processing of applications.

The central problem is that immigration law conceives of children as merely the property of their parents, such that their voices are rarely heard. Visa applications are usually made by the adult who must satisfy the ‘primary criteria’ for the grant of a visa, which secondary (child) applicants will then be deemed to fulfil. Additionally, children may have to satisfy certain ‘secondary criteria’ in relation to health and character. The general presumption is that children are subsumed within the applications of responsible adults – the adult is the active decision maker with children subject to parental control. This conceptualisation is most acute in the case of refugee applications.

While children can make their own claims for protection, in practice children are often not interviewed by the Department of Immigration to see if they have a separate claim that could be considered. This can result in the failure to appreciate claims that might operate to the advantage of a family group as a whole. The problem is that a rejection of the parent’s claim will result in a

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<sup>29</sup> See Commonwealth Ombudsman *Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application*, August 2001, available online at: [www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports\\_2001\\_dima\\_visa.pdf/\\$FILE/DI-MA-Kiane-aug01.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2001_dima_visa.pdf/$FILE/DI-MA-Kiane-aug01.pdf).

rejection of the child's case as well – whereupon the children are statute barred from making a subsequent or separate application for protection.<sup>30</sup>

All refugee claims should be assessed on their individual merits and as far as practicable, children must be given an opportunity to express their views on the matter, whether personally or through a responsible adult. The New Zealand *Immigration Act 1987* (NZ) s 141D provides that immigration officers must give due weight to children's views, taking into account the child's age and level of maturity and understanding.

The immigration status of a child as a lawful or non-lawful citizen should be considered separately from their parents or siblings as while there may be a cross-over between the circumstances of children and their parents, their legal status can be different. Therefore the individual status of each child should be separately considered, before an officer can properly form a reasonable and objectively justified suspicion that their detention is required by s 189 of the *Migration Act 1958* (Cth).

The research conducted for the *Seeking Asylum Alone* Report uncovered many shortcomings in the training and interview techniques of officers charged with the processing of unaccompanied children seeking protection in Australia as refugees. Although attempts are being made to improve the system, many of the criticisms made in the 2006 report have yet to be addressed. While the culture within the immigration Department has been affected greatly by the change in government, this remains a portfolio where the absence of a national scheme for the protection of human rights is felt acutely.

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<sup>30</sup> Amendments made in 2001 to s 36(2) and s 48A of the *Migration Act 1958* (Cth) mean that a rejection of a parent's claim as a refugee will apply to the child as well.